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## **Labour, Legality and shifts in the Public/Private divide**

### **ABSTRACT**

This article discusses the changing role that work performed in private homes has played, and continues to play, in migration law in the Netherlands and at the EU level. It explores to what degree work performed in the home is defined as (exploitative) contractual labour or as inherent to family life, and what this means for claims to residence rights as precursor to citizenship. It does this by reviewing case law of the European Court of Justice (CJEU) and of the European Court of Human Rights (EctHR) against the background of the Dutch case. It reveals tension between how citizenship is being constructed and reproduced at the national level and how it is being constructed and reproduced at the EU level. Following Adam McKeown, this article concludes that different perspectives on (reproductive) labour as a qualification *for* citizenship may reflect different perspectives on (reproductive) labour and the quality *of* citizenship.

Keywords: family, public-private divide, labour, Legality, Europe, Netherlands

### **INTRODUCTION**

In his book *Melancholy Order*, Adam McKeown traces current restrictive migration policies back to the exclusionary clauses introduced by the United States and other (former) settler colonies in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries (McKeown 2008). The purpose of these exclusion clauses was to restrict the migration of Asian workers. An important part of McKeown's argument is that these clauses targeted migrants labelled as bonded labour. Their exclusion found its legitimacy in the movement against slave labour, and the self-definition of the receiving societies as "land of free labour." In his analysis, the political supporters of labour rights are not unrelated to those promoting racist restrictions to labour migration: "...those freedoms and progressive ideals were built on the erection of borders to exclude the rest of the world from participating." (Ibid.: 367).

McKeown's analysis also shows that the (often cosmopolitan) social relations that formerly regulated migration from Asia to the United States and various corners of the British Empire, became discredited as vehicles for human trafficking and smuggling. It was this disqualification of, for example, extended family relations, that made it possible to designate the labour performed by migrants involved in those relations as bonded and hence illegitimate. The migrants performing this labour were disqualified as (potential) citizens on two levels: because they were not free, they could not form part of the conceived

polity of “free citizens”; because they were engaged in unfree labour, they and their labour relationship formed a threat to the achieved regime of free labour. Finally, McKeown describes the tension between local politicians and bureaucrats, who were often sympathetic to workers’ demands for exclusionary clauses, and the federal courts of the US, as well as the British imperial courts, who generally supported the facilitation of international relations and the cross-border movement of labour. Here we see a similar tension to that theorised in this volume, between (suspect) employment as a ground for the exclusion of migrants, and employment as a ground for their inclusion.

Currently in the EU similar tensions to those described by McKeown are evident between the regulation of the free movement of citizens within the EU, and resistance, within Member States, to the admission of migrants from outside of the EU. Thus there is tension between national Dutch policy, in which family ties between Dutch citizens and specific categories of third country nationals are being problematized and redefined as potentially oppressive, and EU law which promotes the admission of non-EU family members to the EU in the interest of facilitating both EU citizens’ freedom of movement and EU citizens’ reproduction within the EU. Conversely, certain forms of work performed within the home that, in national migration law, are excluded from the sphere of paid employment – like that of an au pair for example – may be acknowledged as paid employment by EU law. As I shall argue in this article, a part at least of the current struggle between the EU and its Member States for control over migration finds expression in the ongoing confusion and uneasiness over the nature of work performed in the private home: is it “family life”, “servitude”, or “employment”?

In the rest of this article I shall first trace how family norms have changed in the Netherlands since the Second World War, and how these changes have affected notions of citizenship. I shall then discuss how these changes resonate in the regulation of inclusion and exclusion through Dutch migration law. As I shall argue, the meaning of the post-war figure of the breadwinner citizen has become an ambiguous one. On the one hand he represents a patriarchal order that has come to be discredited as oppressive to women, warranting exclusion. On the other hand, he stands for privileges that are still associated with citizenship, but that in fact are becoming increasingly elusive to a growing number of citizens, such as state protection against the uncertainties of unemployment, disability and old age. This section will be based on the legal-historical research that I did for my monograph: *The Family and the Nation. Dutch family migration policies in the context of changing family norms* (Van Walsum 2008).

Next I shall discuss recent case law of the Court of Justice of the CJEU on the freedom of movement of EU citizens and their (non EU) family members. My contention is that this case law reflects a shift in family norms. As a result, less value is being attached to the role of the breadwinner, and more to that of the provider of home-based care and household services (whether paid or unpaid) than is the case in Dutch migration law. While less exclusionary than Dutch family migration law, this case law does challenge us to question what issues a regime of internationally mobile labour raises for the reproductive sphere when this is no longer premised on the privileges of the male breadwinner-citizen.

Finally I shall explore how tensions surrounding the nature of reproductive labour are currently being mediated through international human rights law. Up until now, this has occurred at the level of national case law on human trafficking, and in case law of the ECtHR in Strasburg. Now that the EU has become party to the European Convention of Human Rights (ECHR), this arena can shift to the CJEU in Luxemburg, where champions of

respectively the right to respect for family life and the right to protection against exploitation may well prove to be giving expression to competing perspectives on the future quality of citizenship in the EU.

#### THE BREADWINNER CITIZEN AS CHIEF ADDRESSEE OF THE POST WAR WELFARE STATE

As in most Western European nations, in the Netherlands too the post-war model of the welfare state was grounded in the concept of the male breadwinner citizen: on assumptions about full and lifelong employment, the emancipation of the nuclear family from broader social structures (extended family, religious congregations etc) and the “gender contract” between the male breadwinner and his female home-maker spouse (Bussemaker 1993; De Regt 1985). Where the male breadwinner formed the target of insurances and benefits meant to protect against loss of income, his wife and the mother of his children formed the main focus of the more normative project of modernity. Housewives – referred to as “social pace setters” - were encouraged, informed and, if need be, actively instructed in their role as home-makers, care providers and mothers of the new generation of modern Dutch citizens (Gastelaars 1985).

The notion that their respective roles within the nuclear family were inherent to men and women’s identities as citizens, found support in the protection that law afforded to the male breadwinner’s nuclear family as a discrete and stable unit. Until 1985, foreign wives of Dutch husbands had privileged access to their spouse’s nationality, while Dutch wives of foreign husbands were assumed to take on the nationality of their spouse, and not the other way around (De Hart 2003). In Dutch immigration law, protection of the nuclear family as a unit remained a key principle until the mid 1990’s.

By the end of the twentieth century, Dutch family law that had originally been organized around a unitary conception of the family as heteronormative, marriage-centred and highly gendered, had come to focus on the autonomous individual: sexually emancipated, gender neutral and self-supporting. This didn’t occur without a struggle. In the unruly 60’s and 70’s, debates on family norms and sexual freedom were so polarized that for a long time there was a political deadlock (Bussemaker 1993; see also: Kooy 1975). It took lengthy legal procedures, most addressing the right to respect for family life as protected by article 8 of the ECHR, to finally break the deadlock and free the way for the legislative reforms of the 1990’s (Holtrust 1993).

As the result of these struggles, heterosexual marriage is no longer being enforced as the only legitimate form of family life, but neither is it being protected as an institution. Homosexuality and non-marital sex have lost their stigma, but matrimony has lost its sanctity. Man and wife are no longer brought together by God; the state can be justified in separating them in the national interest. While the relationship between parent and child still enjoys a strong degree of protection, particularly in the realm of international law, it too has become more vulnerable to state intervention. Across the board, family life has come to be seen as a matter of individual responsibility, but one that allows for and even requires monitoring by a tutorial state. Ironically, a development that started with a struggle for sexual freedom, has resulted in the creation of new vectors for state intervention in the intimate sphere (Van Walsum 2008; c.f. Glendon 1989).

In the fields of social security and social benefits, all adult individuals are now assumed to support themselves. Paid labour, rather than family relations, has become the major, and by now it would seem the only, vector to social participation and substantive

citizenship (Knijn & Cuyvers 2002). Providing unpaid care is no longer seen as the essence of (subordinate) female citizenship and social security provisions no longer compensate for women's unpaid commitment to care. Neither, however, has care been sufficiently reformulated as a collective responsibility of the state (Schultze & Tyrell 2002; c.f. Fudge and Owens 2006, p. 3). The new model citizen is expected to be readily available for the labour market, unhampered by burdens of care.

As the public/private gender divide is becoming less marked, a new hierarchy seems to be emerging on the labour market. Significantly, since the mid-1990s, there has been a steady increase, across advanced economies, in the number of persons hired on a part-time basis, of independently employed persons, of persons working on temporary contracts, and of persons hired through employment agencies (Knecht 2008; c.f. Conaghan Fischl & Klare 2002; Stewart 2011). The combined statistics of the *Uitvoeringsinstituut Werknemersverzekeringen* (UWV, the organization that administers all of the formal social security schemes in the Netherlands) and of Statistics Netherlands, indicate that more than 13 percent of the current working population in the Netherlands is self-employed, while more than 25 percent of those in salaried employment is hired on a temporary basis. The figures also show that these two categories have grown in importance over the past ten years, and that they run the highest risk of becoming unemployed in periods of recession (SER 2010: 177). While providing full-time home-based care is no longer validated as the calling of the citizen-wife, the former ideal of the male citizen as breadwinner threatens to become defunct as well (Knecht ??).

#### THE BREADWINNER CITIZEN IN CURRENT DUTCH MIGRATION LAW: AN AMBIGUOUS FIGURE

In the same period that family norms were being hotly contested in the Netherlands in the 1970s and 80s, the cultural rights of migrants were also becoming a political issue.. These discussions were carried out in a context of accelerated decolonization and anti-racist activism. According to the dominant discourse of the time, the Netherlands was a multicultural society, in which no cultural tradition was promoted as superior to any other (Tinnemans 1994). As long as cultural rights were protected, family ties associated with those rights enjoyed protection as well. And to the extent that Dutch male citizens still held a strong claim to the protection of their family rights, limiting male migrants' rights to family reunification remained problematic.

By the early 1990s the multicultural honeymoon was over. In the same period that a new consensus was finally being reached in the Netherlands on family law, a new interest also emerged in the notion of citizenship as an expression of national identity and cohesion. Having and maintaining cultural rights as an ethnic minority was no longer seen as a right that should be protected, but as a hindrance to effective participation in the dominant society.<sup>1</sup> This implied a policy of assimilation, but in order for minorities to be assimilated, there had to be a normative framework for them to conform to. This normative framework was largely found in the same norms that informed the emerging consensus on family law: equality between the sexes, sexual freedom, the individual right to choose and the individual responsibility that this implied. And as in the contemporaneous discourse on social security, in the emerging discourse on integration too, civic participation came to be primarily defined

in terms of paid labour (Verwey-Jonker Instituut 2003). In both discourses, one acquired civic virtue through work. A “good citizen” was a working individual. Issues of faith, and minority culture were no longer construed in terms of civic rights or virtues, but relegated to the private sphere (Mulder 1994).

The liberal and secular terms that came to inform Dutch family law produced a new touchstone of Dutch identity that made it possible to construct migrant identity as its antithesis, defined in terms that are patriarchal, sexist, religiously bound and gendered. *He* is lacking in the individualist spirit and self-sufficiency required by our modern, competitive and market-driven society; *she* is passive, poorly educated and submissive, incapable of raising her children to join the new breed of citizens. *He* forms a threat to her emancipation, so *she* should be excluded in her own interests. *She* might raise citizens to delinquency and should hence be excluded in the interest of the nation (cf. Kraler, Kofman, Kohli & Schmoll, 2011; Grillo 2008).

This message is very explicitly conveyed by proposals that the then ruling Dutch cabinet sent to Dutch parliament in October 2009 for further restrictions on family migration.<sup>2</sup> The recommended restrictive measures are repressive in nature, aiming to tighten control and widen the scope for criminal sanctions. The explicit assumption is that only men bring over a spouse from abroad, and that these men are all heterosexual and usually of a “non-western” migrant background. Ethnically Dutch men who choose to marry a foreign spouse are assumed to do so because they expect she will be less emancipated, more compliant, subservient and ‘willing to provide sexual services’ than a woman raised in the Netherlands. These men are therefore accused of displaying an attitude that “does not coincide with the Dutch premise of equality within marriage.”(p.6) In effect, they are discredited as Dutch citizens.

Yet while these proposals promote the new individualistic and egalitarian family norms as being ‘typically Dutch’, they also require that sponsors in the Netherlands and their aspiring family migrants comply with the norm of the breadwinner citizen and his dependent spouse. The sponsor in the Netherlands must have a steady job, earning more than minimum wage, and a certain level of education, so as to be able to provide the migrant spouse with a ‘stable future’, while the migrant spouse’s right to stay is kept dependent on the ongoing stability of the relationship. The Dutch government has even decided to extend this period of dependency from three to five years.<sup>3</sup>

Thus, the breadwinner citizen plays an ambiguous role in current Dutch discourse on migration law. While he is still presented as the model of civic responsibility that the welfare state is supposed to rely on and support, the patriarchal order he once stood for serves to mark and exclude the undesirable migrant as everything that the modern day Dutch citizen is no longer supposed to be. Those who aspire to the ideal of a full-time steady breadwinner, but cannot reach it in the current context of precarious employment and changing gender roles, may find comfort in this ambiguity: the national welfare state continues to present the role they aspire to as that of the deserving citizen, entitled to the privileges and security that this implies, while promising to exorcise the evils associated with that role through restrictive migration policies.

## FAMILY LIFE IN THE EU REGULATION OF FREEDOM OF MOVEMENT

A serious obstacle to achieving the kind of reforms proposed by the earlier (and current) Dutch cabinets is the current regulation of freedom of movement within the EU. Dutch citizens who wish to circumvent Dutch restrictions on family migration can do so by moving

to another EU member state. Once settled there, they can request the admission of their foreign family member on the grounds of EU law on the freedom of movement of EU citizens and their family members. Once the foreign family member has gained entry to the territory of the EU, the entire family can – in due course – return to the Netherlands, again on the basis of EU, not national, migration law. This tactic is sometimes referred to as the ‘U-turn’ (see further Chalmers *et al* 2010: 470-473; and Bierbach in this special issue).

That EU laws on the freedom of movement within the EU should trump national rules regulating family migration to the EU is not an obvious matter. In fact, this was and still is a contested issue (c.f. Costello 2009; Oosterom-Staples, 2012). Following the judgement of the CJEU in 2003 in the *Akrich* case, it initially looked like member states would maintain jurisdiction over family migration from third countries into the EU, and that EU law would only apply to third-country nationals who were already legally residing in one of the EU member states, but wished to accompany an EU-citizen family member to another member state.<sup>4</sup> At the time, it seemed as if the CJEU had now elected to grant member states the right to regulate family migration at the outside borders of the EU, only applying EU law to family migration taking place *within* the territory of the EU

In 2004, the EU Directive 2004/38 (the Citizenship Directive) on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states was adopted. This formed a single codification of all previous legislation on the freedom of movement within the EU. The European legislator could have taken this opportunity to integrate the *Akrich* judgement into this directive, however it did not do so. Article 3 of the directive stipulates in paragraph 1 that the directive is to “apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members, as defined in point 2 of Article 2 of the directive, who accompany *or join them* (my emphasis).”<sup>5</sup>

In 2008, the CJEU ruled that family members from third countries could claim residence rights on the basis of this directive, regardless of whether or not they had already been admitted to reside in one of the EU member states.<sup>6</sup> This case concerned four rejected asylum seekers, all originating from West Africa. All four of them were married to women who resided in Ireland, but held nationalities of other EU member states. Their wives’ claims to freedom of movement fell under the jurisdiction of EU law. The question was whether their claims included residence rights for a husband who had been refused admission to one of the EU member states. The Irish state, referring to the earlier decision in *Akrich*, decided that this could not be the case. But the CJEU did not agree. In its judgement, the CJEU explicitly rejected its earlier position in *Akrich* and referred to the newly implemented Directive 2004/38, stating that “if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed”<sup>7</sup> and that “as recital 5 in the preamble to Directive 2004/38 points out, the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of dignity, be also granted to their family members, irrespective of nationality.”<sup>8</sup>

The decision in this case, generally referred to as the *Metock* case, has paved the way for EU citizens to reunite with family members from outside of the EU, once they have left their own country and made use of their right to freedom of movement within the EU. An important question is to what extent these EU citizens can subsequently return to their own country, in the company of their migrant family members, on the basis of EU law, and thus circumvent restrictive national policies. In 2007 the CJEU ruled in the case of a Dutchman of



Surinamese origin, named Eind, who had left the Netherlands and moved to the UK. There he successfully applied to have his Surinamese daughter join him as the child of an EU citizen-worker who has made use of his freedom of movement. Some months later, Mr. Eind returned to the Netherlands and asked to be admitted, along with his daughter, even though he had no intention of taking up paid employment in the Netherlands. The Dutch state refused, arguing that the man could not qualify as an EU citizen-worker who was making use of his freedom of movement, since he planned to stop working once he was back in the Netherlands. The CJEU however ruled that, if citizens of Member States are not guaranteed the right to return to their home country, in the company of their family members, after having moved to another EU country, they may refuse to leave in the first place. Hence they would be inhibited in their freedom of movement. On grounds of EU law, the Netherlands therefore had to allow Mr. Eind back into the Netherlands, in the company of his daughter.<sup>9</sup> In combination with this decision in the *Eind* case, the decision in *Metock* amounts to an official acceptance of the legitimacy of the U-turn tactic described above (c.f. Costello 2009).

This implies a considerable restraint on member states' control over family migration by third country nationals. Admittedly, the member states may adopt the necessary measures to refuse, terminate or withdraw any right conferred by that directive in the case of abuse of rights or fraud, such as marriages of convenience. However until now, the CJEU has interpreted the freedom of member states to refuse admission on such grounds in a restrictive fashion. The single fact that the citizen of one EU member state has moved to another in order to be able to claim rights under EU law for his or her third country family members is not enough to establish abuse of rights.<sup>10</sup>

#### *Exit the breadwinner citizen?*

Interestingly, the CJEU not only associates the right to 'lead a normal family life' with EU citizenship, it also links care provided within the family to the fundamental freedoms associated with EU citizenship. In 2002 the CJEU ruled that a British salesman would be hindered in his freedom to provide services throughout the EU, if his Filipino wife was unable to stay in his home in the UK and look after his children while he was on the road.<sup>11</sup> In the same year, the CJEU ruled that the child of an EU citizen who had made use of his or her freedom to work in another EU member state has an independent right to remain in that member state and receive an education there, even if the EU-citizen parent has moved elsewhere. In order to make this right effective however, the care-providing parent would have to share in this right, regardless of his or her nationality.<sup>12</sup> In fact, for the children of EU citizens who have made use of their freedom of movement *as workers*, this will even be the case when the care-providing parent has no independent source of income and must depend on welfare benefits.<sup>13</sup>

In 2004, the CJEU ruled that the Irish infant Catherine Chen would not be able to effectively enjoy her right to reside in the UK unless her Chinese mother, her primary care provider, was able to reside there with her.<sup>14</sup> In 2011, the ECJ went a step further and acknowledged that children with EU citizenship must always be able to effectively enjoy their right to reside in the EU, regardless of whether or not they have ever left their country of nationality.<sup>15</sup> Again, this means that the child's primary care giver must be allowed to reside with the child, regardless of whether or not he or she is an EU citizen. Later that same year, however, the CJEU ruled that the parent who is not the primary care giver cannot derive residence rights from EU law unless the child with EU citizenship has moved to settle

in another Member State.<sup>16</sup> Hence care labour and family life are both related to EU citizenship, but in different ways. While care labour is constitutive of the EU citizen child's fundamental right to reside on EU territory, family life is constitutive of the adult or minor EU citizen's fundamental right to freedom of movement within the EU.

The family reunification rights of EU citizens as these were originally drafted in the 1950's reflected the gendered family norms of that time. The recent case law challenges those norms however. As argued above, a care provider is acknowledged as constitutive of at least one fundamental aspect of EU citizenship, namely the right of an EU citizen minor to be brought up and educated in the EU. The care provider is granted residence rights on this basis regardless of her own nationality and regardless of whether or not she is still "attached" to the sponsor-spouse. On the other hand, the traditional qualities of the male breadwinner seem to have lost their relevance. All three sponsors in the *Metock* case were women with EU citizenship, applying for the admission of their third country national husbands. Already in 1986 the British Mrs. Reed was able to act as the sponsor of her husband, even though she was a woman and had only a part-time job in the Netherlands.<sup>17</sup> In general, the case law of the CJEU on the freedom of movement makes it clear that to be acknowledged as an economic actor and hence to be entitled to the fundamental freedom of movement for work or the provision of services, one need not qualify as a breadwinner – any work performed on a regular basis in exchange for money is sufficient to allow one to qualify (Kraamwinkel 2002; see also: Hilbrink 2010).

Interestingly, a shift in thinking about the family has actually been made explicit in the case law of the ECJ. In his opinion by the *Baumbast* case, Advocate General Geelhoed pointed out that Regulation 1612/68, that applied at the time, failed to take account of changes that had occurred in family relations, particularly the loss of marital stability (Hofstotter 2005). Now, article 13 of the Directive 2004/38 on the right of citizens of the Union and their family members, that has come to replace Regulation 1612/68, does in fact provide for the retention of the right of residence in case of divorce. This in contrast to the Dutch proposals, cited above, that aim to make migrant spouses more dependent of their Dutch or settled migrant sponsors, rather than less so.

## TENSIONS BETWEEN FREEDOM OF MOVEMENT AND DUTCH FAMILY MIGRATION LAW

One can summarise the link between EU citizenship and family relations as follows. First, the enjoyment of family life is inherent to the enjoyment of one of the most fundamental elements of EU citizenship, the right to freedom of movement within the EU.<sup>18</sup> Second, an EU citizen need not be a breadwinner in order to be acknowledged as a worker and enjoy the residence rights that derive from that status, including the right to family reunification. Third, care work provided in the context of family relations is a necessary prerequisite for the reproduction of EU citizens and workers, that must be acknowledged and, if need be, financially supported by the member states.<sup>19</sup>

The case law of the CJEU projects a notion of citizenship that differs both from the post-war model of the breadwinner citizen, and from the self-supporting individual currently promoted through Dutch social security and integration policies. The emerging EU notion of EU citizenship is not shaped by an explicitly gendered hierarchy. Nor does it link worker identity to a steady job that earns a family (or even a survival) wage, but to any activity that

is deemed economically productive. None the less, the EU notion of citizenship does include both family life and care labour as constitutive elements.

While post-war welfare regimes projected an explicitly gendered notion of citizenship that was settled and reproduced through stable family ties, the case law of the CJEU projects a more gender neutral notion of citizenship that is mobile and reproduced through family relations that are potentially unstable. Current Dutch family migration policy however projects a notion of “responsible” citizenship by maintaining the ideal of a (male) provider. At the same time it disqualifies those cross-border family relations that are assumed to be “too patriarchal”, and hence unsuited to the reproduction of self-supporting individuals. EU law, on the contrary, does not distinguish between migrating family members on normative or (implicitly) ethnic grounds, but only on the basis of whether or not their legal presence in the EU will facilitate EU citizens’ freedom of movement and/or their reproduction within the EU. Given these tensions, there is clearly scope for tension between Dutch national family migration policies and the EU regulation of the freedom of movement within the EU.

The CJEU has moreover placed the ultimate financial responsibility for the reproduction of this mobile citizenry with the member states, who must grant residence rights and, if need be, financial support to the primary care provider of children with EU citizenship.

In claiming that the case law of the CJEU reflects a stronger appreciation of the practical worth of care labour than Dutch migration law and none of its ethnic bias, I do not wish to suggest that this case law is necessarily emancipatory. Although the term “primary care provider” as used in EU law need not exclude men,<sup>20</sup> in practice it will generally refer to women. And as Wendy Brown (1995) has pointed out, regimes that control women as care providers directly through the administration of welfare benefits are not necessarily less oppressive than those that control them indirectly through a patriarchal system of family law. Moreover, the fact that EU law does not require workers to earn a steady family wage in order to qualify as citizens, raises the question: will EU law promote forms of labour protection and social security formerly associated with the breadwinner’s role as inherent to EU citizenship? Or will it be instrumental in structuring an economy grounded in flexible, mobile – even precarious – labour, individually rather than collectively insured (if at all) against illness, old age, disability and unemployment (c.f. Supiot 2000, Barea & Cesana 2003)?<sup>21</sup>

## ANXIETY CONCERNING THE NATURE OF HOME-BASED CARE WORK

### *Family life or servitude?*

The tension between the current CJEU case law and current Dutch policy discourse on family migration is made manifest in conflicting perspectives on the value of care labour performed by migrants for citizens in the privacy of the home. As argued above, the CJEU has acknowledged the practical value of care labour that facilitates mobility among EU citizens and allows children with EU citizenship to grow up and be educated in the EU. . In current Dutch policy discourse on family migration, care work in the home is not explicitly validated in a positive fashion. In fact, certain forms of care work in the home are presented as problematic, justifying exclusion from residence rights and, ultimately, citizenship. In the letter to the Dutch parliament, quoted above, the former Dutch cabinet suggests that some

forms of marriage migration actually amount to human trafficking, aimed at providing a groom's parents in the Netherlands with the unpaid domestic labour of a migrant daughter-in-law. In such cases, it is suggested, family migration policies are not facilitating citizens' family life, but servitude.

Interestingly, similar ideas are also evident in current Dutch legal discourse on the issue of trafficking. In her first report on human trafficking in the Netherlands, after the definition of human trafficking had been expanded to include work outside of the sex industry, the Dutch national rapporteur on human trafficking referred to wives being exploited by husbands and in-laws, and children being exploited by parents (Dettmeijer-Vermeulen et.al 2007: 222, 227, 233, 234). Up until now, the Dutch courts have not gone so far. Nonetheless, the three cases that ended in a conviction did lie within the indeterminate realm between the intimacy associated with family relations and the commodified sphere of paid employment (Dettmeijer-Vermeulen et.al 2007: 21-23). <sup>22</sup>In the Netherlands at least, the legal discourse on trafficking other than for the sex industry seems to be largely about where family life ends and exploitation begins.

This anxiety concerning the distinction between family obligations and servitude in the provision of care and household services within the home is not limited to the Netherlands. The French courts who ruled in a trafficking case that eventually came before the European Court of Human Rights, were also challenged to draw this line.<sup>23</sup> This *Siliadin* case concerned a Togolese girl, whose parents had sent her to France at the age of fifteen to stay with a family there. While the parents had assumed this family would provide her with and education, they in fact passed her on to another family who put her to work looking after their children and their home. In its final judgement the French Civil Court of Appeal came to the conclusion that the couple concerned had exploited the labour of a person in a vulnerable position, but had not subjected her to working conditions that were "incompatible with human dignity."

One of the considerations that led to the conclusion that *Siliadin* had been exploited, was the fact that she had not been paid, while "it had been established that the young woman ... was not a member of their family" (par. 23) and that "she was not considered a family friend, since she was obliged to follow Mrs. B.'s instructions... and was not free to come and go as she pleased." (par. 44). Here the difference between her and a family member had to be established in order to be able to conclude that her lack of remuneration amounted to exploitation. Conversely, precisely because the work that she did was so similar to what "normally" transpires within families, it was by definition not incompatible with human dignity: "As the court of first instance correctly noted, carrying out household tasks and looking after children throughout the day could not by themselves constitute working conditions incompatible with human dignity, this being the lot of many mothers." (par. 44). On both points, the court was involved in negotiating the interface between the contracted labour provided by an employee working in a private home and work performed in the home on the basis of family obligations.

While in the past migration law moved in tandem with patriarchal family norms, reinforcing the gendered division of labour within the home, family unity and the authority of the male head of the family, this relationship has now become more complex. This is particularly evident in nations – like the Netherlands – that prize themselves for having shaken off the oppressive order of patriarchy, much as the US in the 19<sup>th</sup> century could pride itself for having thrown off the yoke of slavery. There where patriarchy is now seen as a form of exploitative labour, migrants who are assumed to be brought in for this purpose may be

excluded, in their own interests and in the interests of the nation's liberated family order. Like the exclusion clauses analysed by McKeown, that specifically targeted Asian migrants, this too can prove to be a selective process. Thus Dutch migration law imposes less restrictions on the admission of family members coming from so-called "western nations" (like Canada, the US, Australia or Japan) than those coming from so-called "non-western" nations (in Africa, South America and most of Asia).<sup>24</sup>

### *Employment or family obligation?*

In all of the CJEU's judgments in family migration cases cited above, the value of home based care labour and its relevance for the enjoyment and reproduction of EU citizenship has only been acknowledged in the context of family relations. Interestingly however, in the later case law, the emphases has shifted away from EU citizens' right to respect for family life with third country family members to the practical importance of a third country national as primary care giver for the effective enjoyment of an EU citizen's right to reside and/or move within the EU.<sup>25</sup> Arguably, the "primary care giver" need not necessarily be a parent (Hofstotter 2005). An intriguing question is whether a third country national could also claim residence rights on the basis of the ECJ's case law if she were performing her work as a "primary care giver" on the basis of an employment relationship. What if the Irish baby Catherine Chen, for example, had been entrusted to the care of a Filipina domestic worker, instead of that of her Chinese mother? Would her paid nursemaid also have to be granted the right to reside in the UK so that Catherine would be able to enjoy her fundamental freedoms as an EU citizen? And if so, what might this mean for the residence rights of her Chinese mother?

On the whole, the status of domestic work and home-based care as paid labour is contested within most Member States of the EU, as is the admission of "low-skilled" migrants from outside of the EU to work in this sector. The extent to which care and domestic services provided in private homes is regulated as an employment relation, as self-employment or as a (quasi) familial obligation differs from one Member State to the other. Admission policies regarding domestic workers and care providers from outside of the EU similarly differ. These workers have been granted residence permits as migrant workers, as family migrants, as au pairs, through regularization schemes or not at all (Tomei 2011; Gallotti 2009).<sup>26</sup>

Here too, there is potential for tension between national policies and EU migration law. In Dutch migration law, for example, au pairs are explicitly not acknowledged as workers. They are granted residence rights as surrogate teen-age relatives who are taken up into the home, given some pocket money and initiated into Dutch culture, while being expected to "pull their weight" in the household in exchange. By contrast, home-based care work performed by an au pair has been recognized by the CJEU as economically relevant labour, and those who perform this work are acknowledged as workers..<sup>27</sup> This lack of consensus concerning the status of home-based care and domestic work can, to my mind, be seen as another indication of the current anxiety and confusion concerning the nature of this work and the role it should play in the processes of inclusion and exclusion regulated through migration law.

Both the opponents of trafficking in domestic work and the champions of family reunification appeal to international human rights law to support their claims. The first group appeals to article 4 of the ECHR, that protects against slavery, forced labour and servitude. The second group appeals to article 8 of the ECHR, that protects the right to respect for family and private life. The *Siliadín* case quoted above make clear how defining a case in terms of family life can obstruct protection against servitude and vice versa. In the end, the debate concerning the nature of *Siliadín*'s relation to the family where she worked was not resumed before the ECtHR since the French Government conceded she had been subjected to forced labour. In a more recent case, the ECtHR did have to take a stand on the question as to whether or not a young woman who had been sent abroad and subsequently put to work providing home-based care had been trafficked, or was simply migrating in the context of (extended) family ties.

The young woman in this case had come to Denmark as a child in the context of family reunification with her father, who had been admitted as a refugee from Somalia. When she was fifteen, her father took her to a refugee camp in Kenya to visit family there. While she had assumed she was going for a short visit, her father in fact left her there to care for his mother, who was ill. Two years later the girl asked to be allowed back into Denmark to rejoin her mother (her parents had by then divorced). The Danish state refused, principally because the girl had already passed the maximum age set by Danish law for family reunification between minor children and their parents.

Those representing her case before the ECtHR stated that, by sending his daughter abroad against her will to care for his mother, the father had in fact been guilty of human trafficking and that the Danish state should have prosecuted him and offered their daughter the necessary protection. The ECtHR rejected this argument on the grounds that the girl herself had never reported being a victim of human trafficking. Nor had her mother ever made any such complaint. The ECtHR moreover pointed out that: "... the exercise of parental rights constitutes a fundamental element of family life, and that the care and upbringing of children normally and necessarily require that the parents decide where the child must reside and also impose, or authorise others to impose, various restrictions on the child's liberty ..." (par. 64). Like the French courts in the *Siliadín* case, the ECtHR too places relations within the sphere of family life beyond the reach of labour law and the distinction it makes between "free" and exploitative labour. Where legitimate family life ends and (exploitative) employment begins is a question that remains open to contestation however. It will most likely continue to drive debates in the field of family migration law, obliquely reflecting the emerging tensions between national and EU interests that are at stake.

## CONCLUSION

If the case law of the CJEU has implications for how the borders of the EU are to be drawn, it will have implications for human relations within those borders as well. In more unequivocal terms than national migration law, the CJEU's perspective on the link between family migration and citizenship spells the end of the male breadwinner citizen as chief addressee of the national welfare state, and of his associated privileges and responsibilities: his right to

a family wage and the associated benefits and securities, his duty to support his wife and children, and his parental authority over and moral responsibility for his children as future citizens.

At first glance this case law seems to offer new opportunities to validate, without gender, class, ethnic or racial prejudice, cross-border family relations and the practical care these can provide. But it also suggests a reconfiguration between state and family in controlling reproductive labour, and between state and market in mitigating the exploitative nature of productive labour relations. Whether these reconfigurations imply further emancipation for those involved – whether labouring in the private or in the public sphere – remains to be seen.

Since the treaty of Lisbon, the EU has become a party to the European Convention of Human Rights. Some authors predict that EU institutions, and particularly the ECJ, will now embrace an international human rights agenda in order to give more substantive meaning to the notion of EU citizenship (see for example: Tryfonidou 2009). The future development of the CJEU's case law is however by no means certain.<sup>28</sup> Will the shift away from patriarchy in the current case law of the ECJ form part of a supra-national regime meant to endow EU citizens with stronger claims to respect for family life, regardless of gender, class or ethnic origin? Or is it after all linked to a regime primarily aimed at creating a 'level playing field' that can facilitate an increasingly mobile and flexible economic order within the EU - one that is reproduced via family relations that are instable and financially insecure and therefore ultimately reliant on state support and hence subject to state control?

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<sup>1</sup> Kamerstukken II 1993/94, 23684, nr. 2.

<sup>2</sup> Kamerstukken II 2009/10, 32 175, nr. 1.

<sup>3</sup> Tweede Kamer 2011-2012, Kamerstuk 32175 nr. 21.

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- <sup>4</sup> C-109/01 *Akrich* [2003] ECR I-9607. See also Chalmers 2010: 470.
- <sup>5</sup> EU Citizens Directive 2004/38/EC, Art. 3 (1) (emphasis included).
- <sup>6</sup> C-127/08 *Metock* [2008] ECR I-6241. See also Chalmers 2010: 470-1.
- <sup>7</sup> *Metock*, para. 60.
- <sup>8</sup> *Metock*, para. 83. See also: Currie 2012.
- <sup>9</sup> C-291/05 *Eind* [2007] ECR I-10719.
- <sup>10</sup> *Akrich*, para. 111. See also Chalmers: 472.
- <sup>11</sup> C-60/00 *Carpenter* [2002] ECR I-6279. See also: Toner 2003.
- <sup>12</sup> C-413/99 *Baumbast* [2002] ECR I-7091.
- <sup>13</sup> C-480/08 *Teixeira* [2010] ERC I-1107.
- <sup>14</sup> C-200/02 *Chen* [2004] ECR I-9925. See also Hofstotter 2005 and the article by Jeremy Bierbach in this volume.
- <sup>15</sup> C-34/09 Ruiz Zambrano [2011] ERC I-??
- <sup>16</sup> C-256/11 Dereci [2011] ERC I-??; see also: Shuibhne 2012.
- <sup>17</sup> C-59/85 Reed [1986] ECR 1283.
- <sup>18</sup> *Metock*.
- <sup>19</sup> See: *Carpenter, Baumbast, and Teixeira* quoted above.
- <sup>20</sup> Arguably, the Surinamese-Dutchman Mr. Eind could be seen as a male primary care giver who, in that capacity, was successful in claiming his rights to freedom of movement under EU law.
- <sup>21</sup> For tendencies in this direction in Dutch social security law, see:
- <sup>22</sup> The first of these cases concerned irregular migrants working as domestic workers for their extended family. The second concerned a mentally handicapped Dutchman coerced into doing household chores, among other things, for a neighbour who had abused his friendship. The third concerned a woman forced, by her ex-partner, into smuggling cocaine.
- <sup>23</sup> ECtHR 27 July 2005, application nr. 73316/01
- <sup>24</sup> See: De Vries 2012. Interestingly, foreign migrants who qualify as highly skilled enjoy the most privileged position as sponsors – more so in fact than Dutch citizens. Like EU citizens, highly skilled migrants from third countries have been granted a privileged position in terms of family reunification so as to facilitate their international mobility as workers (reference: F&N)
- <sup>25</sup> Compare the ECJ's judgement in the *Carpenter* case, in which article 8 of the European Charter of Human Rights (the right to respect for family life) plays a key role, with the later judgments in the *Chen* and *Baumbast* cases, for example, in which no such reference is made to this article. See also: Hofstotter 2005.
- <sup>26</sup> Concerning domestic workers in regularization programs, see:  
[http://fra.europa.eu/fraWebsite/attachments/FRA-report-domestic-workers-2011\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA-report-domestic-workers-2011_EN.pdf), p. 187.
- <sup>27</sup> C-294/06 *Payir, Akyuz & Ozturk vs. Secretary of State* 24 January 2008.
- <sup>28</sup> See for example the diametrically opposed opinions of advocate general Sharpston in the *Ruiz Zambrano* case and of advocate general Kokott in the *McCarthy* case (C-434/09),